

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

THOMAS F. BANGASSER,)	
)	CPSGMHB Case No. 08-3-0006
)	
Petitioner,)	<i>(Bangasser)</i>
)	
v.)	
)	
KING COUNTY COUNCIL,)	ORDER ON MOTIONS and
)	DISMISSAL
Respondent.)	
)	
and)	
)	
K-2 CORPORATION)	
)	
Intervenor.)	
)	
)	
)	
)	

SYNOPSIS

In October of 2008, King County adopted Ordinance No. 16263, Amendment 27 which reclassified certain real property on Vashon Island from Industrial to Community Business. A PFR was filed by Thomas F. Bangasser challenging the action. Subsequently, King County filed a Motion to Dismiss challenging the Petitioner's standing. After a review of submitted briefs and the record, the Board determined the Petitioner did not have standing and dismissed the case.

I. BACKGROUND

On December 22, 2008, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Thomas F. Bangasser (**Petitioner** or **Bangasser**). The matter was assigned Case No. 08-3-0006, and is referred to as *Bangasser v. King County*. Board member David O. Earling is the Presiding Officer (**PO**) for this matter. With this PFR, Petitioner challenges King County's (**Respondent** or the **County**) adoption of Ordinance No. 16263. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**) or the State Environmental Policy Act (**SEPA**).

On December 29, 2008, the Board issued a “Notice of Hearing” in the above-captioned case.

On January 20, 2009, the Board received K-2 Corporation’s Motion to Intervene.

On January 22, 2009, the Board conducted the Prehearing Conference.

On January 26, 2009, the Board received Petitioner’s Restatement of Legal Issues, as requested by the Board.

On January 29, 2009, the Board issued its “Prehearing Order and Order on Intervention” that set the final schedule, legal issues to be decided, and granted the intervention of the K-2 Corporation.

On January 22, 2009, the Board received County’s “Respondent’s Document Index.”

On February 4, 2009, the Board received a Request for Clarification from Petitioner.

On February 5, 2009, the Board received correspondence from King County requesting a delay on ruling on the Request for Clarification until the County filed its Dispositive Motion.

On February 6, 2009, the Board received the County's Dispositive Motion to Dismiss (**County Motion**) with seventeen exhibits and Intervener’s Motion to Dismiss in support of the County (**K2 Motion**).

On February 9, 2009, the Board issued its Order on Petitioner’s Request for Clarification, granting, in part, Petitioner’s request.

On February 10, 2009, the Board received Petitioner’s Motion for Summary Judgment with seven exhibits.

On February 20, 2009, the Board received Petitioner's Response to County’s Motion to Dismiss (**Bangasser Response**) with four exhibits.

On February 20, 2009, the Board received the County’s Response to Petitioner’s Motion for Summary Judgment.

On February 20, 2009, the Board received Intervener’s Response to Petitioner’s Motion for Summary Judgment.

On February 27, 2009, the Board received Respondent King County’s Rebuttal on its Motion to Dismiss (**County Reply**).

On February 27, 2009, the Board received Intervener’s Rebuttal on its Motion to Dismiss (**K2 Reply**).

On February 27, 2009, the Board received Petitioner’s Rebuttal on its Motion for Summary Judgment Dated February 6, 2009.

08-3-0006 Order on Motions and Dismissal

Bangasser v. King County (March 13, 2009)

The Board did not hold a hearing on the dispositive motions.

II. MOTION TO DISMISS

At issue in this case is King County's rezoning of 11.6 acres [K-2 Property] on Vashon Island from an Industrial designation to a Community Business designation.

King County moves the Board to dismiss the PFR in its entirety and supports this request by a contention that Petitioner has not met the standing requirements set forth in RCW 36.70A.280(2). The County asserts Petitioner has not established GMA participatory standing or standing under the Administrative Procedures Act (APA), RCW 34.05.530, within the PFR. The County further argues the Petitioner has not established standing under the State Environmental Policy ACT (SEPA), RCW43.21C.¹ Intervener concurred in the County's Motion.² In response, Petitioner argued his participation with the Vashon-Maury Island Community Council satisfied the GMA's standing requirements.³ In reply, King County continued to assert that Petitioner had not established standing to pursue this challenge before the Board.⁴

Motion to Dismiss for Lack of Standing

The Board Rules of Practice and Procedure provide as follows:

A petition for review shall substantially contain:

(d) A statement specifying the type and the basis for the petitioner's standing before the board pursuant to RCW 36.70A.280(2);

WAC 242-02-210(2)(d).

The Bangasser PFR contained the following statement regarding standing:

Petitioner is a member of the Vashon-Maury Island Community Council (**VMICC**), Chair of its Economic Committee, member of its Land Use Committee, member of its committee to "evaluate the recommended changes to the Vashon Town Plan," former President of the Chamber of Commerce, tax payer and resident of Vashon, Washington.⁵

The County contends that this statement is inadequate to establish standing and consequently the PFR must be dismissed.⁶

¹ County Motion, at 2, 11-13.

² K2 Motion, at 1-3.

³ Bangasser Response, at 11-15

⁴ County Reply, at 1-5.

⁵ Bangasser PFR, Section IV, at 2.

⁶ County Motion at 2 and County Reply, at 1-2.

In the early 1990's the Board's position on standing was that a *prima facie* case for standing must be made by Petitioner in the PFR.⁷ However, in early 1996, the Board reversed itself and stated:

*The Board holds that petitioners must specify within their petitions for review which method of standing allows them to proceed with a case before the Board. For instance, petitions for review relying upon APA standing must either allege that the petitioners are within the zone of interest of the GMA and that they have been injured by the local government's GMA action, or they must cite to the specific GMA standing provision under which they qualify. (i.e., 36.70A.280(2)'s language qualified pursuant to RCW 34.05.530). However, although the petition should also contain information that supports these allegations, it need not contain such evidence. Instead, if the petitioner's alleged standing is challenged, the petitioner will be given the opportunity to provide additional evidence in response. Thus, petitioners must specify which method of standing (appearance [sic participation] APA or governor certification) they are relying upon to obtain GMA standing. The Board's holding in Pilchuck that a prima facie case must be made within a petition for review is **reversed**. Therefore, in considering the dispositive motion in this case, the Board will consider other evidence provided by the petitioners beyond the petition itself.*⁸

(Emphasis supplied).

It is noteworthy that in his PFR, Petitioner did not allege any basis for standing other than his membership and involvement with the Vashon-Maury Island Community Council. Up until 1996, that would have been an inadequate basis to establish standing and the Board would dismiss the PFR without further consideration. However, since 1996, the Board will look beyond the PFR to see if Petitioner has provided sufficient evidence to establish standing to bring a challenge.

RCW 36.70A.280(2) governs the standing requirements for appearing before the Boards. It provides, in relevant part (emphasis added):

A petition may be filed only by....(b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested.

The GMA requires opportunities for public participation so that city and county decision-makers will have the benefit of citizen input prior to adopting plans and regulations. Thus, in order to challenge an adopted ordinance, the GMA petitioner must show that he made his concerns known to the city or county so that they had a chance to respond to them before they

⁷ See *Pilchuck et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0047, Order Granting Snohomish County's Dispositive Motion to Dismiss SEPA Claims, (Aug. 17, 1995), at 3-4.

⁸ *Hapsmith, et al v. City of Auburn*, CPSGMHB Case No. 95-3-0075c, Final Decision and Order, (May 10, 1996).

took the complained-of action.⁹ This is the basis for the requirement of “participation standing.”

Participation standing is further clarified by RCW 36.70A.280(4), which provides:

To establish participation standing under subsection (2)(b) of this section, a person must show that his or her participation before the county or city was reasonably related to the person’s issue as presented to the board.

The enactment of RCW 36.70A.280(4) incorporated the holdings in *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn. App.657, 999 P.2d 405 (2000), where the Court of Appeals clarified that to establish participation standing under the GMA, a person must show that his or her participation before the jurisdiction was reasonably related to the person’s issue as presented to the Board. In essence, GMA participation standing requires two things. First, the petitioner must have actually participated in the adoption or amendment process for the plan or development regulation in question. This involves more than just attending a public meeting or hearing but actually voicing concerns, orally or in writing, to the jurisdiction. Second, the petitioner’s participation must be reasonably related to the subject matter of the issues raised before the Board.

Thus, standing is not based merely on the submittal of oral or written comments, but on a finding that those comments are reasonably related to the subject matter raised by the Petitioner. Here Petitioner is appealing the County’s rezoning of 11.6 acres of property, but the Board can find nothing in the PFR, subsequent submittals by Petitioner or the record, that indicates that Petitioner voiced his concerns – participated – in the County’s public process about the rezoning amendment.

Email correspondence¹⁰ provided by Petitioner inquires as to the public process for adoption of the subject rezone – it does not voice concerns. Additionally, this chain of email correspondence was sent from November 28, 2008 to December 2, *after* the challenged ordinance was adopted. Comments submitted *after* the jurisdiction has taken action cannot be used to support participation standing.

Petitioner attended a March 27, 2008, meeting regarding the 2008 King County Comprehensive Plan.¹¹ However, mere attendance at a meeting does not rise to the level of GMA participation to establish standing. Other than asserting he provided oral testimony before King County’s Growth Management and Natural Resources Committee, Petitioner provides no evidence (*i.e.* transcript or minutes of the proceedings) which demonstrated he

⁹ *Mariner Village et al v. Snohomish County*, CPSGMHB Case No. 08-3-0008, Order on Motions (Sept. 3, 2008).

¹⁰ See Petitioner’s Exhibits Appendix D in Petitioner’s Motion for Summary Judgment.

¹¹ *Id.* Appendix E.

actually did address the County on the subject matter of his concern which was the zoning designation of the K-2 property.

Petitioner submits, in Exhibit 2 of his Response Brief, the January 21, 2008 email correspondence between himself and Paul Reitenbach, Senior Policy Analyst for DDES. This correspondence relates to a motion before the VMICC on a “proposed rezone” of the K2 property and the process, including community input, for this proposal. The responding correspondence denotes that no rezone has been submitted to the County but that VMICC is currently considering recommendations to be submitted for the 2008 update, for which the King County Council would begin review after March 1, 2008. This email correspondence relates to the subject property. However, with the exception of inquiry to what the process is, no “subject matter” is contained nor does the Petitioner voice any concern that the County is not complying with the GMA or SEPA.

The Petitioner has provided the Board with no evidence that he participated before the County “regarding the matter on which review is being requested.” Petitioner has not established GMA participation standing.

Additionally, Bangasser’s PFR made no mention of APA standing or SEPA standing, nor did Petitioner provide any evidence along with his response brief to indicate his interests fall within the zones of interest protected by GMA or SEPA, nor did he provide any evidence of an injury-in-fact, specific, speculative or otherwise, that Petitioner would suffer as a result of the challenged action. In short, Petitioner has failed to establish that he has standing in any form to continue his pursuit of the challenged action. The County’s motion to dismiss the PFR in its entirety is **granted**.

Having dismissed the PFR for lack of standing, the Board need not, and will not, address Petitioner’s Motion (for Summary Judgment).¹²

III. ORDER ON MOTION TO DISMISS

Based upon review of the GMA, Board’s Rules of Practice and Procedure, briefing and exhibits submitted by the parties, case law and prior decisions of this Board, and having deliberated on the matter, the Board enters the following ORDER:

1. King County’s Motion to Dismiss for Lack of Standing is **granted**.
2. The Petition for Review in *Bangasser v. King County* is **dismissed**.
3. CPSGMHB Case No. 08-3-0006 is **closed**.

¹² The Board entertains dispositive motions only on timeliness, standing, subject matter jurisdiction and notice/public participation. The purpose of a dispositive motion is to expedite the process of having a legal issue considered by the Board where there is a limited record and uncontested facts. When material facts are disputed or contested the Board will not rule until full briefing, with exhibits, has been received and the Hearing on the Merits occurs. Petitioner’s motion went to the merits of his case.

So ORDERED this 13th day of March, 2009.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David O. Earling
Board Member

Margaret Pageler
Board Member

Edward G. McGuire
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.¹³

¹³ Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)